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OCT 11 2005

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA

**BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)

No. 02-1133

JAMES J. EVERETT,
Bar No. 011205

AMENDED¹
DISCIPLINARY COMMISSION
REPORT

RESPONDENT.)

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on May 6, 2005, pursuant to Rule 58, Ariz. R. S. Ct., for consideration of the Hearing Officer's Reports filed December 14, 2005 and January 14, 2005 recommending a censure, one year of probation upon reinstatement effective the date of the signing of the probation contract, completion of no less than nine hours of continuing legal education in the area of ethics, and costs of these disciplinary proceedings. Both parties filed a Notice of Appeal objecting to the Hearing Officer's Report. Respondent, Respondent's Counsel and Counsel for the State Bar were present at oral argument.

Respondent argued that no violations occurred and that the case should be dismissed or, at most, should result in an informal reprimand.

The State Bar argued that the Hearing Officer erred by dismissing as a matter of law a violation of ER 8.1(b), and all of the violations alleged in the complaint² were proven by clear and convincing evidence and that Respondent's misconduct warrants a suspension.

¹ The Commission granted Respondent's Motion for Reconsideration by separate Order.

² The Complaint alleged violations of ERs 3.3(a) (false statement to court), 4.1(a) (false statement to others), 8.4(c) (misrepresentation), and 8.4(d) (conduct prejudicial to administration of justice). Additionally, the Complaint alleged violations of ER 1.4(a), former ERs 1.15(b) and (c), currently ERs 1.15(d) and (e), and ER 8.1(b), which the Hearing Officer determined the State Bar failed to prove by clear and convincing evidence.

Standard 6.0 addresses Violations of Duties Owed to the Legal System. *Standard*

6.13 (False Statements, Fraud, and Misrepresentation) provides:

Reprimand (censure in Arizona) is generally appropriate when a lawyer is negligent in either determining whether statements or documents are false or in taking remedial action information is being withheld, and causes injury or potential injury to a party to a legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

The Hearing Officer found *Standard* 6.13 applicable because Respondent was attempting to help his clients and rationalized his behavior as being of assistance to clients without violating an express directive of the courts thereby, causing harm to the orderly administration of the Bankruptcy Court. *See Recommended Sanction*, pp. 3-4.

The Commission disagrees and upon *de novo* review, finds *Standard* 6.12 more applicable to Respondent's particular misconduct. *Standard* 6.12 specifically provides that:

Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

The Hearing Officer found that Respondent made a knowing and intentional misrepresentation by listing his mailbox address as Dr. Reid's address on Dr. Reid's Chapter 13 Bankruptcy Petition. *See Findings Of Fact and Order*, p. 11:9. The Hearing Officer also found that Respondent inserted misleading information on the Bankruptcy Petition for the purpose of avoiding having to file in the Tucson division of the Bankruptcy Court or having the case transferred to the Tucson division of the Bankruptcy Court. *See Recommended Sanction*, p. 3:7.

Clearly, the record supports that Respondent knowingly submitted false information to the court and caused an adverse effect on the legal system; therefore, the Disciplinary Commission finds that the presumptive sanction for Respondent's misconduct is suspension.

In consideration of the appropriate length of suspension, the Disciplinary Commission reviewed aggravating and mitigating factors. The Hearing Officer found one aggravating factor, 9.22(a) prior disciplinary offenses,³ and two mitigating factors, 9.32(b) absence of selfish or dishonest motive, and (e) full and free disclosure to disciplinary board and cooperative attitude toward proceedings. It is not clear if the Hearing Officer found that factor 9.22(i) substantial experience in the practice of law was present. In his Recommended Sanction, p. 2:18, the Hearing Officer initially stated that although Respondent has substantial experience in the practice of law, he did not find it to be an aggravating factor in this case. In contrast, he later finds that "on balance, the mitigating factors outweigh the aggravating factors of prior disciplinary offenses and substantial experience in the practice of law." *Id* at p. 5:17.

The Disciplinary Commission found that aggravating factor 9.22(i) substantial experience in the practice of law is supported by the record and finds this factor *de novo*. Respondent was admitted to practice law in Arizona on May 9, 1987.

In addition, previous case law has established that prior discipline is an aggravating circumstance that weighs strongly against an attorney in a disciplinary proceeding. *Matter of Brady*, 186 Ariz. 370, 375 (1996). Respondent was previously admonished in two separate matters for similar misconduct involving misrepresentations to the Bankruptcy

³ Respondent received an informal reprimand and probation (LOMAP) effective 12/04/01 in File No. 97-0010 for violating ERs 3.3 and 8.4 and an informal reprimand and probation (LOMAP) effective 12/04/01 in File No. 98-0166 for violating ERs 3.3, 8.4 and SCR 51(e).

1 Court. Consequently, the Disciplinary Commission determined *de novo* that a reduction in
2 the presumptive sanction of suspension is not justified. The Commission concludes that the
3 recommended sanction of censure and probation is not proportional to previous cases
4 involving similar misconduct and will not fulfill the purposes of attorney discipline. The
5 Court has previously held that the sanction imposed should deter the Respondent and other
6 attorneys from engaging in similar unethical conduct. *In re Kleindiest*, 132 Ariz. 95, 644
7 P.2d 249 (1982).

8 Lawyers are reminded that they are officers of the court and should not engage in
9 conduct that wastes judicial time and resources. Respondent's misrepresentations in this
10 case manipulated the venue rules and prevented the Bankruptcy court from efficiently
11 managing its docket.

12 In this case, although Respondent's prior disciplinary matters were not yet final,
13 Respondent clearly was on notice that misrepresentations in bankruptcy filings constitute
14 ethical violations. Such notice was present throughout the period when Respondent used the
15 false address in order to stay within the Phoenix Division of the Bankruptcy Court.

16 In *In re Bowen*, 178 Ariz. 283, 872 P.2d 1235 (1994), a suspension was imposed in
17 part on the basis of two prior censures, even though Bowen's misconduct occurred before
18 the censures were final and continued after the censures were finalized. The record supports
19 that Respondent was on notice that misrepresentations to the Bankruptcy Court are
20 considered ethical breaches, and prior offenses, especially those that are similar in nature,
21 are appropriately considered aggravating circumstances.

22 Additionally, *In re Augenstein*, 178 Ariz. 133, 871 P.2d 254 (1994), held that
23 discipline imposed while a matter is pending can be considered an aggravating factor of
24 prior discipline. Here, Respondent was on notice by the pendency of the prior matters that
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misrepresentations to the court are unethical. The Commission is persuaded by the similarity of the prior discipline and the conduct giving rise to the prior discipline that a short-term suspension is warranted.

In summary, based on *de novo* review of the presumptive sanction of suspension and in consideration of the aggravating and mitigating circumstances factors present in the record, the Disciplinary Commission concludes that a more appropriate sanction is a 30 day suspension and one year of probation.

Decision

The nine members of the Disciplinary Commission unanimously recommend accepting and adopting by reference the Hearing Officer's findings of fact and conclusions of law, but modify the sanction to a 30 day suspension and one year of probation and costs.⁴ The terms of probation are as follows:

1. Respondent shall discontinue the use in the practice of law, any address that is not clearly designated as his law firm's address.
2. Respondent shall correct all pending bankruptcy petitions in which he designated his address as the address of the petitioner, without identifying the address clearly.
3. Respondent shall complete no less than nine hours of continuing legal

⁴ The Hearing Officer's Reports are attached as Exhibit A.

education in the area of ethics during the probation period.

RESPECTFULLY SUBMITTED this 11th day of October, 2005.

Cynthia L. Choate, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 11th day of October, 2005.

Copy of the foregoing mailed
this 11th day of October, 2005, to:

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